No. 80472-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(COURT OF APPEALS NO. 35247-8-II)

CHARLES SALES and
PATRICIA SALES, a married couple,

Respondents,

v.

WEYERHAEUSER COMPANY,
a Washington corporation,

Petitioner.

RESPONDENTS' ANSWER TO *AMICUS CURIAE* BRIEFS OF ASSOCIATION OF WASHINGTON BUSINESS & THE BOEING CORPORATION RE WEYERHAEUSER'S PETITION FOR REVIEW

Matthew P. Bergman
Brian F. Ladenburg
BERGMAN & FROCKT
614 First Avenue, Fourth Floor
Seattle, WA 98104
Telephone (206) 957-9510
Fax (206) 957-9549

John W. Phillips
Matthew Geyman
PHILLIPS LAW GROUP, PLLC
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104
Telephone (206) 382-6163
Fax (206) 382-6168

Counsel for Respondents

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I. INTRODUCTION

Respondents reply here to the *amicus curiae* briefs of Association of Washington Business ("AWB") and The Boeing Company ("Boeing") that were filed in support of Weyerhaeuser's Petition for Review of *Sales v. Weyerhaeuser Co.*, 138 Wn. App. 222, 156 P.3d 303 (2007). AWB and Boeing mischaracterize — just as Weyerhaeuser and *amici* the Coalition for Litigation Justice, Inc. *et al.* ("the Coalition") have — the fundamental issue that the Court of Appeals decided. The issue was not whether the Multi-District Litigation ("MDL") proceeding in the Eastern District of Pennsylvania was an adequate alternative forum, but whether the forum that Weyerhaeuser proposed in Arkansas was an adequate forum. As the Court of Appeals properly held, Weyerhaeuser failed to meet its threshold burden of showing that Arkansas was a "real" alternative. Thus, the trial court's balancing analysis comparing Pierce County Superior Court to Arkansas was an artificial exercise.

AWB and Boeing erroneously postulate that Weyerhaeuser had, and was deprived of, a right to remove this case from Arkansas state court to federal court in Arkansas. In fact, as respondents have explained in their prior briefing, the assumed right to remove this case to federal court never existed, because the case was filed in Washington where federal law prohibits removal. Weyerhaeuser had no right to have this Washington case dismissed in the first instance, since a *forum non conveniens* dismissal would have been appropriate *only* upon Weyerhaeuser showing that its proposed alternative forum in Arkansas was adequate and real. Because Weyerhaeuser never met this burden, it had no right to a *forum*

non conveniens dismissal, and thus no right to remove the case from Arkansas state court to federal court and from there to the MDL.

The arguments that AWB and Boeing have repeated regarding the Supremacy Clause and the "unconstitutional conditions" doctrine, and the new argument made by Boeing regarding how much delay is acceptable in an alternative forum before the forum becomes inadequate, all start from this erroneous assumption. AWB and Boeing have thus offered nothing that would justify review.

II. ARGUMENT

A. The Court of Appeals' Decision Raises No Constitutional Issues.

AWB and Boeing repeat prior arguments by Weyerhaeuser and the Coalition claiming that the *Sales* decision raises a constitutional issue warranting review, either because it poses an "unconstitutional condition" on the granting of a benefit, or because it violates the Supremacy Clause of the United States Constitution. AWB Brief at 4-8; Boeing Brief at 8-10; *compare* Weyerhaeuser Petition at 6-12, Coalition Brief at 6-9. Respondents have already explained why these arguments are unfounded, and will not repeat all those arguments here. *See* Respondents' Answer to Petition at 10-17; Respondents' Answer to Coalition at 8-9.

To summarize, the "unconstitutional conditions" doctrine "holds that the government may not grant a benefit on the condition that the beneficiary surrender a *constitutional right*." *Butler v. Kato,* 137 Wn. App. 515, 530, 154 P.3d 259 (2007) (emphasis added). Because a diverse defendant's opportunity to remove a case to federal court arises under a

federal statute, not the Constitution, the unconstitutional conditions doctrine has no application here. *See* Respondents' Answer to Petition at 12-16; Respondents' Answer to Coalition at 8-9.

The only case either of these *amici* cites in support of a contrary position is the 120-year-old *Barron v. Burnside,* 121 U.S. 186, 200, 7 S. Ct. 931 (1887), in which the Court held that a state cannot impose conditions that "are repugnant to the Constitution *and* laws of the United States." AWB Brief at 7 (emphasis added). *Barron*, however, referred to the "Constitution *and* laws of the United States," not the Constitution *or* laws of the United States. *Barron*, 121 U.S. at 186. The unconstitutional conditions doctrine requires abridgement of a *constitutional* right, and no case holds to the contrary, *i.e.*, that the doctrine applies where the right at issue is merely statutory. The Supremacy Clause does not convert federal statutory entitlements into constitutional rights.

With respect to the Supremacy Clause, *amici* repeat the argument that (1) a state cannot impair federally-granted rights, such as the right of a diverse defendant to remove a case from state court to federal court; and (2) if diversity of citizenship would exist in an action by Mr. Sales and his wife against Weyerhaeuser in the Arkansas state court, then the Washington court violated Weyerhaeuser's federally-granted right to remove the action to federal court by conditioning the *forum non conveniens* dismissal on Weyerhaeuser's stipulation to try this case in the Arkansas state court. *See* AWB Brief at 4-6; Boeing Brief at 8-10.

The error with this reasoning is that Weyerhaeuser had no right to have this case dismissed in the first place. A *forum non conveniens*

dismissal is discretionary, not mandatory, and is appropriate *only* upon a showing that the proposed alternative forum is not only more convenient based on the convenience factors but also adequate and real. The only way to ensure that the Arkansas forum proposed by Weyerhaeuser — which was the assumed alternative that the trial court analyzed in its balancing of convenience factors — would be the *actual* forum was to require a stipulation to litigate the case in Arkansas state court. *See, e.g.*, *Wolf v. Boeing Co,* 61 Wn. App. 316, 320, 810 P.2d 943 (1991) (trial court has authority to dismiss on *forum non conveniens* grounds "subject to a stipulation to jurisdiction in a more convenient forum"). Remarkably, a*mici* argue that by virtue of the Supremacy Clause, a defendant is entitled to secure a *forum non conveniens* dismissal by proposing an alternate forum in which it has no intent to litigate. Such an argument abuses the Supremacy Clause and would make a mockery of *forum non conveniens* practice.

The question thus is whether the Supremacy Clause is offended where a defendant that has been sued in state court in its home state — where removal is barred by federal statute — is required to agree to remain in its proposed alternative forum as a condition for securing a *forum non conveniens* dismissal in its home state. Because Weyerhaeuser had no right to remove the case to federal court unless or until a *forum non conveniens* dismissal was first properly granted, the Supremacy Clause was not implicated by requiring it to meet the threshold requirement of establishing that its proposed alternative forum was adequate and *real* as a condition of obtaining such a dismissal.

Otherwise, a defendant could secure a *forum non conveniens* dismissal under false pretenses through a "bait and switch" strategy. The defendant could pretend to propose an alternative forum (say, Arkansas) and argue that that the proposed alternative was more convenient under the applicable convenience factors, all the while intending to remove the case to federal court and then transfer it to another place (say, the asbestos MDL in Eastern District of Pennsylvania) that was never proposed to or analyzed by the trial court. This scenario is what Weyerhaeuser, the Coalition, AWB and Boeing all contend should have been allowed by the Court of Appeals here. Nothing in the Supremacy Clause requires any court to render *forum non conveniens* analysis into such a charade.

Finally, it is beyond dispute that conditions may properly be attached to *forum non conveniens* dismissals, including, for example, conditions requiring the waiver of substantive statute of limitations defenses. Yet under *amici's* reasoning, a state court could not require a defendant to waive a *federal* statute of limitations without offending the Supremacy Clause. Obviously, the law is otherwise. *See, e.g., Wieser v. Missouri Pacific R.R. Co.*, 98 Ill.2d 359, 373, 456 N.E.2d 98, 104-105 (1983) (conditioning dismissal on waiver of federal statute of limitations defense under FELA and giving leave to reinstate action if defendant refuses to waive or asserts the defense in subsequent action).

B. The Standard for Determining How Much Delay Is Too Much Delay for an Alternative Forum to Be "Adequate" Is Not Relevant to the Petition.

Boeing's brief contains an interesting discussion of the standard for determining whether a proposed alternative forum is adequate. Boeing

Brief at 2-7. However, the trial court in this case did not base its decision to dismiss on a finding that Arkansas (or the MDL) was an adequate forum. *See Sales,* 138 Wn. App. at 228 ("Weyerhaeuser did not argue below that Arkansas in an adequate alternative . . . [and] the trial court did not expressly find that Arkansas constituted an adequate alternative."). Rather, the trial court considered the relative convenience factors to determine whether Arkansas was a *more convenient* forum. *Id.* at 230. Upon finding that six of ten factors favored Arkansas over Washington and that four factors were neutral, the trial court granted Weyerhaeuser's motion to dismiss. *Id.*

The Court of Appeals agreed with the trial court's conclusion that under this balancing of convenience factors, Arkansas state court would be a more convenient forum than Pierce County Superior Court. *Id.* at 231. But — and this is absolutely key —the *Sales* court then found that "this legal conclusion is meaningless if Weyerhaeuser removes the Arkansas state court action to federal court where it is then transferred to the Multi-District Litigation in Pennsylvania." *Id.* In other words, the balancing of factors essential to the *forum non conveniens* determination is an empty exercise if the proposed alternative forum would not be the real forum.

It was at this point — *without* basing its holding on the inadequacy of the MDL as an alternative forum — that the *Sales* court found that the trial court's erroneous conclusion that it could not condition dismissal on Weyerhaeuser's stipulation to try the case in Arkansas state court was an abuse of discretion. *See id.* at 232 ("A court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law") (citing

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). The Court of Appeals went on to discuss serious problems inherent in the MDL, *id.* at 232-34, but because Weyerhaeuser did not propose the MDL as an alternative forum — and the balancing of convenience factors would have been *very different* if the MDL had been compared to Pierce County Superior Court, rather than the Arkansas state court that the trial court considered — whether the MDL could have been an adequate forum was not the basis for the Court of Appeals' decision but simply underscored the potential consequences of the trial court's ruling if it were not reversed.

What is significant is that if, as here, the proposed forum is not the real forum, the court cannot conduct a proper analysis and balancing of the *forum non conveniens* factors as required under Washington law. The Court of Appeals *did not* find that the MDL or any forum was inadequate, but rather that "Weyerhaeuser failed to establish that Arkansas was truly an adequate alternate forum." *Sales*, 138 Wn. App. at 234. And why? The *Sales* court concluded that "Weyerhaeuser failed to prove that Arkansas is an adequate forum because Weyerhaeuser did not establish that Arkansas would be the *real* forum. *Id.* at 229. Thus, while of academic interest, Boeing's discussion of the "adequate alternative forum" aspect of the *forum non conveniens* inquiry is immaterial to this case and no basis for granting the petition.[1]

[1] This is not to suggest that respondents agree with Boeing's position that significant delay cannot render a forum inadequate, but simply that the issue is not germane to the Petition. The Court of Appeals found that

C. No Issue of Substantial Public Interest Is Raised by this Petition.

AWB argues that this case raises issues of substantial public interest because "[i]f every state court conditioned a dismissal for *forum non conveniens* on defendant's waiver of its right to federal diversity jurisdiction, it would empty the doctrine of much of its purpose." AWB Brief at 7. First, the argument grossly overstates the implications of the Court of Appeals' holding. Mere removal without transfer to the MDL would make the alternative forum real – it would still be Arkansas. Second, the argument misses the fundamental point that Weyerhaeuser had no right to remove this case from Arkansas state court to federal court in Arkansas, because Weyerhaeuser had no right to have this case dismissed in the first instance, and a *forum non conveniens* dismissal would have been appropriate *only* upon Weyerhaeuser first showing that its proposed alternative forum was not only more convenient based on the convenience factors, but was also adequate and real — a showing that Weyerhaeuser failed to make.

The Court of Appeals' holding is limited to relatively unusual situations where, as here, a defendant could otherwise render the

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"[b]ecause Sales's condition is terminal, any significant delay could deprive him of his day in court." *Sales*, 138 Wn. App. at 225. Contrary to Boeing's contention, the *Sales* court, in line with supposedly contradictory Washington precedent, *see* Boeing's Brief at 5-6, recognized a tough standard for adequacy: "An alternative forum is adequate so long as some relief, regardless how small is available." *Sales,* 138 Wn. App. at 228. Under the circumstances of this case, delay of the magnitude typical in the asbestos MDL, which would deprive Mr. Sales of his day in court, would meet that standard and render the MDL inadequate.

dismissing court's *forum non conveniens* analysis meaningless by removing *and* transferring the case to a different forum that was not considered by the dismissing court. If a defendant's intended alternative forum is a federal MDL, and it seeks to get there by having a case dismissed on *forum non conveniens* grounds and refiled in another state court from which it would be removed and transferred to the MDL, the defendant should be required to be honest about its intent so the first court can properly determine if *forum non conveniens* dismissal is appropriate. In this case, Weyerhaeuser refused to tell the trial court whether it would remove the case or not. To the extent the public interest is implicated here, it is the interest in preventing a defendant from seeking and obtaining a *forum non conveniens* dismissal on pretextual grounds, and that public interest is served by allowing the Court of Appeals' decision to stand without further examination.

D. The Court of Appeals' Decision Follows Established Precedent Regarding Application of the Abuse of Discretion Standard.

AWB argues that the Court of Appeals wrongly applied *de novo* review to the Court of Appeals' decision "rather than reviewing it under the abuse of discretion standard." AWB Brief at 8. AWB is simply wrong in suggesting that *de novo* review and the abuse of discretion standard are mutually exclusive. As this Court recently held, "[a]n abuse of discretion is found if the trial court . . . applies the wrong legal standard, or bases its ruling on an erroneous view of the law . . . . [and] underlying questions of law we review *de novo*. *State v. Lord,* ___ Wn.2d ___, 165 P.3d 1251,

___ (Aug. 30, 2007); *see also Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (same).

Applying abuse of discretion review, the Court of Appeals agreed with the trial court's finding that Arkansas would be a more convenient forum based on a balancing of the convenience factors. *Sales*, 138 Wn. App. at 230-31. But the Court of Appeals found that the trial court based its decision that it could not condition the dismissal on Weyerhaeuser's agreement to proceed in Arkansas state court on an erroneous view of the law, and thus abused its discretion. *Id.* at 232. It was proper and consistent with Washington precedent for the *Sales* court to determine whether the trial court based its ruling on an erroneous view of the law, and AWB's argument to the contrary is simply wrong.

III. CONCLUSION

For these reasons and the reasons stated in Respondents' Answer to Weyerhaeuser's Petition, Respondents' Answer to the Coalition's *Amicus* Brief, and Respondents' Motion for Expedited Decision on Petition for Review, this Court should deny the Petition expeditiously so that this case can proceed and Mr. Sales can have his day in court.

DATED this 28th day of September, 2007.

Respectfully submitted,

BERGMAN & FROCKT

Matthew Bergman for

Matthew P. Bergman, WSBA #20894
Brian F. Ladenburg, WSBA #29531

PHILLIPS LAW GROUP, PLLC

John W. Phillips, WSBA #12185
Matthew Geyman, WSBA #17544

Attorneys for Plaintiffs/Respondents

CERTIFICATE OF SERVICE

I declare under the penalty of perjury under the laws of the State of Washington that I am over the age of 18 years, not a party to this action, competent to testify in this matter and that on September 28th, 2007 I caused to be served one copy of Respondents' Answer to Amicus Curiae Briefs of Association of Washington Business & The Boeing Corporation re Weyerhaeuser's Petition for Review, as follows:

Diane J. Kero
Elizabeth P. Martin
Gordon Thomas Honeywell, et al.
600 University Street, Suite 2100
One Union Square
Seattle, WA 98104
Via Hand Delivery

James O. Neet, Jr.
Shook, Hardy & Bacon LLP
2555 Grand Boulevard
Kansas City, MO 64108
Via E-mail and U.S. Mail

Mark A. Behrens
Cary Silverman
Shook Hardy & Bacon LLP
600 14th Street NW, Suite 800
Washington, DC 20005
Via U.S. Mail

Paul W. Kalish
Crowell & Moring LLP
1001 Pennsylvania Ave NW
Washington, DC 20004
Via U.S. Mail

Robin S. Conrad
Amar D. Sarwal
National Chamber Litigation Center, Inc.
1615 H Street NW
Washington, DC 20062
Via U.S. Mail

Ann W. Spragens
Robert J. Hurns
Property Casualty Insurers Association of America
2600 South River Road
Des Plaines, IL 60018
Via U.S. Mail

Gregg Dykstra
National Association of Mutual Insurance Companies
3601 Vincennes Road
Indianapolis, IN 46268
Via U.S. Mail

Lynda S. Mounts
Kenneth A. Stoller
American Insurance Association
1130 Connecticut Ave NW, Suite 1000
Washington, DC 20036
Via U.S. Mail

Donald D. Evans
American Chemistry Council
1300 Wilson Boulevard
Arlington, VA 22209
Via U.S. Mail

Kristopher I. Tefft
Association of Washington Business
1414 Cherry Street SE
Olympia, WA 98507
Via U.S. Mail

Richard C. Coyle
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101
Via U.S. Mail

Mark H. Lough
Boeing Law Department
P.O. Box 3707
Seattle, WA 98124
Via U.S. Mail

DATED this 28th day of September, 2007.

By: _____
Carrie J. Klough